

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK AND GERALDINE DELFINO	:	ORDER
	:	DTA NO. 811012
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for	:	
the Years 1986 and 1987.	:	

Petitioners filed a Notice of Motion for an order to compel written depositions of non-parties pursuant to 20 NYCRR 3000.5, specifically requesting that six non-party witnesses be compelled to answer written depositions pursuant to the procedure outlined in Civil Practice Laws and Rules 3108; and, upon the certification of Donald A. Richards, Esq., dated March 9, 1993, in support of said motion; and also upon the affidavit of Donna M. Gardiner, Esq., together with the attachments thereto, in opposition to petitioners' motion; it is ordered that:

Petitioners filed a petition in this matter for a redetermination of deficiencies of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1986 and 1987 on or about July 23, 1992. An answer was filed by the Division of Taxation ("Division") thereto on or about October 7, 1992 which was accompanied by a demand for a bill of particulars. Sometime subsequent to the service of the answer and demand for a bill of particulars, petitioners filed a bill of particulars in which they listed certain named individuals who allegedly had knowledge of certain activities performed by petitioners during the years in issue which petitioners believe establish their domicile in the State of New Jersey.

Petitioners, through their representative, requested oral depositions to be taken of these individuals at their representative's office in West Orange, New Jersey. However, the Division did not agree to taking oral or written depositions.

Petitioners brought this motion before the Division of Tax Appeals on March 15, 1993

seeking an order to compel the written depositions of six non-party witnesses allegedly set forth in the bill of particulars and in the motion herein. The Division opposes said motion on the grounds that: (a) said motion was not timely filed; (b) that said motion was not filed with the Supervising Administrative Law Judge as required by regulation; and (c) that petitioners have not shown good cause why an order should be granted in this specific circumstance.

It is noted that petitioners seek an order for a mode of discovery which does not exist in the Rules of Practice and Procedure of the New York State Tax Appeals Tribunal. The only provision for depositions in the Rules is for depositions to perpetuate testimony (20 NYCRR 3000.6[d]). Included within said regulation is a provision for the taking of depositions on written questions (20 NYCRR 3000.6[d][8]).

The regulation at 20 NYCRR 3000.5(a) permits an Administrative Law Judge to grant a form of discovery by order "[f]or good cause shown" (20 NYCRR 3000.5[a]). Said section also provides, in part, as follows:

"(1) All motions must be made, on notice to the adverse party, within 90 days after the service of a pleading by the adverse party unless a different time period is otherwise prescribed for a particular motion by this Part."

The last pleading served by the "adverse party", i.e., the party adverse to petitioners herein, was an answer and a demand for a bill of particulars served by the Division on or about October 7, 1992. It is noted that 90 days from October 7, 1992 was January 5, 1993. The instant motion by petitioners for an order to compel written depositions of non-parties was made on or about March 9, 1993, some 153 days after the service of the answer and demand for a bill of particulars by the Division. Therefore, the motion is denied for petitioner's failure to timely file same.

Although not the basis upon which this motion is disposed, petitioners have not shown good cause why an order should be granted which would permit a form of discovery not specifically authorized by the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioners have alleged that certain individuals have knowledge of their activities during the years in issue which they believed established their domicile in the State of New Jersey.

However, petitioners merely asserted that it was impractical for them to arrange for these individuals to be present at the hearing of this matter to be held in Troy, New York and that it was too expensive for them to pay for their witnesses' travel and lodging expenses. There was no substantiation for either of these assertions.

Petitioners also have not explained why depositions on written questions should be utilized rather than affidavits, since neither allows the finder of fact to weigh the credibility of the witnesses. Although a deposition on written questions allows for cross-examination, it cannot be equated with the opportunity to cross-examine a witness at hearing since depositions, oral or written, are discovery devices which primarily are not meant to replace testimony at hearing (other than those used to perpetuate testimony -- not the case herein).

It is ordered that petitioners' motion for an order to compel the written depositions of six non-party witnesses is denied in all respects.

DATED: Troy, New York
April 8, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE